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March 11, 1996

## VIA HAND DELIVERY

Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, DC 20554

RECEIVED

MAR 11 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**Re: Telefónica Larga Distancia de Puerto Rico, Inc.'s Reply To  
Oppositions To Petition For Reconsideration  
(IB Docket No. 95-22; RM-8355; RM-8392)**

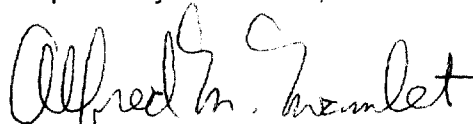
Dear Mr. Caton:

Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD"), by its attorneys, hereby submits for filing an original and eleven copies of their Reply To Oppositions To Petition For Reconsideration in connection with the above-captioned matter.

Also enclosed is an additional copy of TLD's Reply To Oppositions To Petition For Reconsideration which we ask you to date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,



Alfred M. Mamlet  
Counsel for Telefónica Larga Distancia  
de Puerto Rico, Inc.

/srh-m  
Enclosures

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

**RECEIVED  
MAR 11 1996**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Market Entry and Regulation of  
Foreign-Affiliated Entities

IB Docket No. 95-22  
RM-8355  
RM-8392

**REPLY TO OPPOSITIONS TO  
PETITION FOR RECONSIDERATION**

**I. INTRODUCTION**

Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD") hereby files its Reply to the Oppositions filed by both AT&T and MCI to TLD's Petition for Reconsideration of the Commission's Foreign Carrier Entry Order issued in the above-captioned proceeding.<sup>1/</sup> In Its Petition, TLD argued that the ECO analysis should not be applied to third countries where the foreign carrier has little (less than 25%) or no investment in the U.S. foreign-affiliated carrier applicant. In the alternative, the ECO analysis should be applied to U.S. carriers with controlling investments in foreign firms. The bottom line is that the Commission's Rule creates an untenable double standard that should be eliminated.

Both AT&T and MCI fail to justify this double standard. Their claim that the double standard is necessary to open foreign markets to U.S. firms is not only short-sighted, but is transparently self-serving. Neither AT&T nor MCI address the

<sup>1/</sup> Market Entry and Regulation of Foreign-Affiliated Entities, IB Docket No. 95-22, Report and Order (rel. Nov. 30, 1995) ("Foreign Carrier Entry Order"); Petition for Reconsideration by TLD filed in IB Docket No. 95-22 (Jan. 29, 1996) ("Petition" or "TLD Petition"). The Commission should strike MCI's Opposition because MCI failed to serve TLD in violation of the Commission's rules. 47 C.F.R. § 1.429(f).

detrimental effect that the Commission's policy has on the long-term prospects for development and liberalization in third markets. Nor do they offer any convincing rational as to why U.S. carriers' controlling investments in foreign carriers should remain exempt from the ECO standard -- aside from giving such U.S. investments themselves protection from competition.

At a minimum, the Commission should adapt its ECO test to fit the unique needs of developing countries in a way which encourages, not discourages, their liberalization efforts. The Commission should not apply the ECO analysis where a developing country has: (1) privatized a substantial portion of its telecommunications carrier; (2) offered U.S. firms an equal opportunity to participate in the privatization and enjoy any exclusivity period; and (3) established a date certain for competition for international services.

## **II. THE COMMISSION SHOULD NOT APPLY THE ECO TEST TO A CARRIER'S INVESTMENTS IN THIRD COUNTRIES**

The Commission's application of the ECO test to a foreign-affiliated carrier's investments in third countries will impede and penalize market opening measures in those countries. Thus, the Commission should limit its application of the ECO analysis to such routes where the foreign carrier has an investment of at least 25% in the U.S. carrier applicant. Contrary to the claims of AT&T, such a revised standard would promote rather than "threaten the Commission's market-opening and pro-competitive goals,"<sup>2/</sup> by encouraging privatization, modernization and, ultimately, liberalization of third country markets.

### **A. The Commission's Application Of The ECO Test To Third Countries Will Hinder Development And Liberalization In Those Markets**

The Commission's decision to apply its ECO test to third country markets will have the unfortunate effect of retarding privatization and development -- and hence

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<sup>2/</sup> Opposition of AT&T at 9.

liberalization -- in many developing countries. Such countries do not offer temporary exclusivity arrangements to "encourage foreign monopoly carriers to export their closed home markets," as AT&T contends,<sup>3/</sup> but rather to make it worthwhile for firms, U.S. and foreign alike, to make the substantial financial commitments necessary for countries to privatize and develop their telecommunications markets quickly and intensively. The Commission's decision to apply its ECO analysis to third country markets thus not only penalizes a U.S. carrier's foreign affiliate for its investments by denying the U.S. carrier the U.S. routes, but it signals to other foreign investors that making such investments in the future will be penalized by the United States, decreasing the value of such investments.

While MCI correctly points out that the Commission's ECO test may not deter all bidders in a given privatization,<sup>4/</sup> it does not address the inevitable effect that such a decision by even one bidder would have: reduced competition in the privatization and diminished valuation of the privatization target. If Telefónica Internacional ("TI") had elected not to participate in the Peru privatization, then Peru would have received \$1 billion less. Such reduced competition and valuation will invariably shrink the ultimate amount of capital available for telecommunications infrastructures. The only possible benefit would be that any U.S. firms with winning bids would operate exclusively, without the prospect of being barred from U.S. routes. Such a result has the flavor more of protectionism than of economic liberalism.

**B. The Commission Should, At A Minimum Modify, Its ECO Standard With Respect To Developing Countries**

The Commission should, at a minimum, modify its ECO standard with respect to developing economies. Such a modified approach would go a long ways towards addressing the deleterious effects of the Commission's current standard. The

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<sup>3/</sup> Opposition of AT&T at 9.

<sup>4/</sup> Opposition of MCI at 2.

Commission itself has recently recognized that the needs of developing countries warrant a different international telecommunications model than used for other countries:

We recognize that this transition [to competitive market structures] may be difficult for many developing countries. Such countries are at different levels of economic and infrastructure development and have different needs. Thus, we may need to tailor our policies regarding the developing world.<sup>5/</sup>

The Commission should tailor its entry standard for routes to developing countries to make it consistent with U.S. policy on the Global Information Infrastructure ("GII"). As Chairman Hundt recently urged:

1. Separate telecoms regulators from telecoms operators and privatize the operators as soon [as] possible. Let private foreign investment help that process.
2. Introduce competition in the provision of telecoms services and facilities on a "date certain" basis.<sup>6/</sup>

Accordingly, the Commission should permit a foreign affiliated carrier's entry on routes to affiliated developing countries where: (1) a developing country has privatized a substantial portion of its telecommunications carrier; (2) U.S. competitors have had an equal opportunity to participate in the privatization and obtain exclusivity; and (3) where a date certain is set to introduce effective competition.

The first and third criteria come directly from the fundamental GII principles established by the Commission and Executive Branch. The first principle recognizes that privatization and development will precede full competition. The third principle recognizes that privatization is an important first step towards competition, but

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<sup>5/</sup> In the Matter of Policy Statement on International Accounting Rate Reform, FCC 96-37, ¶ 40 (rel. Jan. 31, 1996).

<sup>6/</sup> *Remarks of Reed E. Hundt, American Chamber of Commerce, In Warsaw, Poland*, 5 (Jan. 23, 1996)

that competition is the ultimate goal. Developing countries should commit to introducing full competition at a date certain as part of the privatization process.

The second criterion is necessary for fundamental fairness. U.S. carriers should have an equal opportunity to participate in the privatization of a telecommunications carrier and to obtain the exclusivity offered pursuant to the established bidding terms. By the same token, if a non-U.S. carrier wins the bidding, it should have access to the U.S. market on the same terms that the U.S. carrier would have enjoyed.

By embracing these criteria, the Commission will send a strong message to developing countries and foreign investors that it supports rapid, effective progress. At the same time, the Commission will better serve its own pro-competitive purposes. These criteria require developing countries to fully embrace the essential precursors to developed, competitive telecommunications markets: market-based privatization fully open to U.S. companies and solid commitment to introducing competition by dates certain. The end result will be a more developed, liberalized global market.

### **III. THE ECO ANALYSIS SHOULD BE APPLIED EQUALLY TO U.S. CARRIERS**

If the Commission decides to retain its application of the ECO standard to third countries, then it must apply the ECO standard to controlling investments held by U.S. carriers in foreign firms.<sup>77</sup> Such an even-handed application of the ECO standard would more fully address any legitimate concerns that the Commission may have about anti-competitive behavior abroad. That neither the Commission itself, nor AT&T, have offered any justifications which would warrant a differential standard underscores not only the fact that it is poor policy, but also that it is blatantly discriminatory.

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<sup>77</sup> TLD supports BTNA's Petition for Reconsideration on this issue.

**A. Neither AT&T Nor The Commission Has Offered Any Convincing Rationale For Exempting U.S. Carriers' Investments In Third Countries From The ECO Standard**

MCI does not even attempt to defend the blatant double standard.

Neither AT&T nor the Commission have offered any rationale which justifies exempting U.S. carriers from the ECO standard. In its Opposition, AT&T asserts that U.S. carriers should be exempt from the Commission's ECO test because: (1) the Commission's jurisdiction over such carriers, unlike its jurisdiction over the U.S. affiliates of foreign-affiliated carriers, provides it with the ability to redress anti-competitive behavior; and (2) application of the ECO test to U.S. carriers runs counter to the Commission's goal of opening foreign markets.<sup>8/</sup> Neither of these rationales is convincing.

**First**, contrary to AT&T's claim, the Commission does have jurisdiction over foreign-affiliated carriers. In particular, the Commission will have the same power over a foreign-affiliated carrier's licenses and authorizations that it does over those of a U.S. carrier. For example, if TLD engaged in anti-competitive behavior on the U.S.-Argentina route, the Commission could take the same remedial action against its licenses and authorizations that it could take against any other U.S. carrier.<sup>9/</sup> That remedial action could include severing TLD's authority to provide service on the U.S.-Argentina route.

**Second**, AT&T contends that to apply the Commission's ECO test to U.S. carriers would thwart the Commission's goal of opening up foreign markets to U.S. investments: "The purpose here is to encourage the entry of U.S. carriers into

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<sup>8/</sup> Opposition of AT&T at 11.

<sup>9/</sup> See Telefónica Larga Distancia de Puerto Rico and LD Acquisition Corporation, 8 FCC Rcd. 106, 116-17 (1992). The Commission and U.S. courts also have jurisdiction over TLD (and probably TI by virtue of its investment in TLD) for violations of the antitrust laws. Foreign Carrier Entry Order at ¶ 105.

foreign markets. . . ."<sup>10/</sup> The Commission's rule does encourage entry of U.S. carriers into foreign markets, but only by penalizing their foreign competitors for winning privatization bids on the same terms offered to U.S. firms.

For example, TI, MCI and STET recently offered competing bids in Bolivia's privatization of its state-owned telecommunications company, which offered a six-year exclusivity period to the winner in return for making investments and meeting performance targets.<sup>11/</sup> STET won. However, had MCI won, it would have enjoyed the six-year exclusivity period in Bolivia without being subject to the Commission's ECO test. MCI nowhere offers any explanation of why it and other U.S. carriers should enjoy such exclusivity without the risk of losing its U.S. routes, while its foreign competitors should not. Similarly, MCI does not explain why its controlling investment in a carrier in Belize should not be subject to the ECO standard.

The Commission's double standard gives U.S. firms a significant -- and unfair -- advantage. If the Commission maintains its ECO rule on foreign-affiliated carriers' routes to third countries, then the Commission should also apply it to the controlling investments held by U.S. companies in foreign carriers.

**B. The Commission's Decision To Exempt U.S. Carriers With Investments In Foreign Carriers From Its ECO Test Violates The Fifth Amendment's Guarantee Of Equal Protection**

By deliberately using its power over Section 214 authorizations to promote foreign market penetration by U.S. carriers in third countries, and to penalize foreign carriers for making the identical investments, the Commission provides U.S. carriers with a significant competitive advantage over both their foreign competitors and their U.S. affiliates. This discriminatory standard constitutes an

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<sup>10/</sup> Opposition of AT&T at 11.

<sup>11/</sup> Telecommunications & Technology in Latin America 1995 at 37, *Latin Finance* (Sept. 1995).



egregious infringement of equal protection that cannot withstand rational basis scrutiny, let alone the strict scrutiny that alienage-based classifications are subject to.<sup>12/</sup>

AT&T concedes that the Commission's rule discriminates against aliens but argues that non-resident aliens are not entitled to constitutional protection.<sup>13/</sup> However, while AT&T makes much of the Supreme Court's rejection of the application of the Fifth Amendment to aliens without contacts with the United States, it acknowledges that aliens with such contacts are, in fact, entitled to constitutional protection.<sup>14/</sup> It merely asserts that "TLD shows neither that the alien corporations and investors to which it refers are within U.S. territory, nor that they have any substantial connections with this country."<sup>15/</sup>

However, a simple comparison of the facts in the cases AT&T relies on with TI's U.S. contacts demonstrates that this is not true. In Johnson v. Eisentrager, the Supreme Court rejected the contention that the Fifth Amendment applied to nonresident enemy aliens during war time -- not that it applied to nonresident aliens in all situations.<sup>16/</sup> The aliens in question had been captured in China, where they were convicted of war crimes by an American military court. They were later transported to Germany where they were imprisoned. At no time were the aliens in question ever within the territorial boundaries of the United States, and at all times they were actively engaged in hostilities. In United States v. Verdugo-Urquidez, the Supreme Court similarly rejected the contention that the Fourth Amendment required U.S. officials, who were working with Mexican officials, to obtain a U.S. search warrant prior to searching

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<sup>12/</sup> See TLD Petition at 11-17 for a discussion of the Supreme Court's equal protection jurisprudence as applied to alienage-based classifications.

<sup>13/</sup> Opposition of AT&T at 11.

<sup>14/</sup> Opposition of AT&T at 12, n. 30.

<sup>15/</sup> Opposition of AT&T at 12.

<sup>16/</sup> 339 U.S. 763 (1950).

the Mexican premises of a Mexican citizen who was arrested in Mexico for drug trafficking.<sup>17/</sup> Clearly, in both cases, the aliens seeking U.S. constitutional protections did not have significant contacts with the United States. Indeed, to apply the Constitution in such instances would be to raise serious questions of foreign policy and international law: both with respect to the laws of war, on the one hand, and the sovereignty of other nations (e.g., Mexico), on the other.

By contrast, TLD's foreign-affiliate, TI, does have substantial contacts with the United States -- as would, by definition, any foreign-affiliate of a U.S. carrier. Such affiliates unquestionably have substantial investments within the United States which are protected by the Fifth Amendment. TI, for example, owns a 79% interest of TLD, which it purchased for more than \$100 million.

Moreover, Fifth Amendment protection is not confined solely to U.S. carriers' foreign investors: the U.S. affiliates are themselves injured.<sup>18/</sup> Firms like TLD will be hampered by imposition of the Commission's ECO test both because they will find it more difficult and more costly to obtain Section 214 authorizations to enter new markets and because they will find it more difficult to attract investors. The net result is that such U.S. foreign-affiliated firms will be less competitive in both the U.S. and international telecommunications markets. Such a double discrimination not only heightens the invidiousness of the classification itself, but also emphasizes the substantive, tangible connections that foreign investors such as TI have with the United States.

#### **IV. CONCLUSION**

At a minimum, the Commission should revise its market entry standard on routes to developing countries where the government: (1) privatized a substantial

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<sup>17/</sup> 494 U.S. 259 (1990).

<sup>18/</sup> See, e.g., Craig v. Boren, 429 U.S. 190, 196-97 (1976); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).

portion of its telecommunications carrier; (2) offered U.S. firms an equal opportunity to participate in the privatization and enjoy any exclusivity period; and (3) established a date certain for competition for international services.

The Commission should not apply the ECO analysis to third countries where the foreign carrier has little or no investment in the U.S. foreign-affiliated carrier applicant. Alternatively, the Commission should apply the ECO analysis to U.S. carriers with controlling investments in foreign firms. One way or the other, the untenable double standard for market entry should be eliminated.

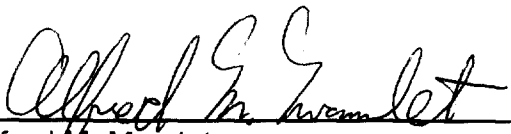
Dated: March 11, 1996

Respectfully submitted,

**TELEFÓNICA LARGA DISTANCIA  
DE PUERTO RICO, INC.**

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## CERTIFICATE OF SERVICE

I, Sandra R. Hammond-Murdico, do hereby certify that a copy of the foregoing **TLD's Reply To Oppositions To Petition For Reconsideration** has been sent, via first class mail, postage prepaid, on this 11th day of March, 1996 to the following:

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